84-1423

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

GUSTOF CHARLES FEYERS AND GABRIELLE FEYERS,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States Court of Appeals
Sixth Circuit No. 83-1402

ROBERT S. PORTNOY
Counsel for Petitioners
For SOMMERS, SCHWARTZ, SILVER, & SCHWARTZ, P.C.
1800 Travelers Tower
26555 Evergreen Road
Southfield, MI 48076

HOWARD SILVER
Counsel of Record
1800 Travelers Tower
26555 Evergreen Road
Southfield, MI 48076

RICHARD D. TOTH
Of Counsel

THE AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

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QUESTION PRESENTED

Whether the discretionary function exception of the federal tort claims act renders the United States immune from suit when a worker employed by an independent contractor engaged by the United States has been injured in the course of doing inherently dangerous work and where the United States has undertaken a contractual obligation to monitor the safety practices of its independent contractor.

LIST OF PARTIES

All parties appeal as named in the caption of the case.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is printed, infra, in Appendix at Page 16a. The opinion of the United States District Court, Eastern District of Michigan, Southern Division, is reported at 561 F. Supp 362 (ED Mich, 1983).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 12, 1983. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

STATUTES INVOLVED

This case involves an interpretation of provisions of the following provisions of the Federal Tort Claims Act, 28 USC §1346(b):

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the DIstrict Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scrope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

28 USC §2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term —

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities of agencies of the United States, but does not include any contractor with the United States.

* * *

28 USC §2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

28 USC §2680(a)

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

No.

IN THE
SUPREME COURT OF THE UNITED STATES

GUSTOF CHARLES FEYERS and GABRIELLE FEYERS,
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-vs-

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
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United States Court of Appeals
Sixth Circuit No. 83-1402

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States;

GUSTOF CHARLES FEYERS and GABRIELLE FEYERS, Petitioners herein, pray that a writ of certiorari issue to rview the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled cause on December 12, 1984.

STATEMENT OF THE CASE

In 1976, Plaintiff, Gustof Charles Feyers, was a Chrysler employee. He was classified as a cement finisher (Tr. Dec. 16, 48) and worked out of Chrysler's Roads and Grounds Department. This department engaged its workers in a number of diverse tasks — building maintenance, cement work, lawn care, trash pick-up and crucially, railroad switching (Tr. Dec. 13, 5[illegible]-56). The job assignments were decided each morning, depending on what had to be done. There was no particular Roads and Grounds crew assigned to perform the railroad operations (*Id.* 57).

On April 24, 1976, Plaintiff, along with a crew of three other men, were engaged in coupling freight cars at the facility known as the Detroit Arsenal Tank Plant. Here Chrysler, pursuant to a government contract, manufactured tanks for the Defendant United States. The plant itself belonged to the Defendant, as did all the surrounding grounds, including the railroad tracks (Tr. Dec. 13, 22-23). Under the terms of the contract, the Defendant was to provide suitable flat cars on which the manufactured tanks were to be loaded for shipment out of the plant. Defendant also owned a railroad switching engine which was maintained at this faclity to be used for the switching operations involved in loading the tanks on to Defendant's railroad flat cars for transport (*Id.* 24, 27-28).

Fellow Chrysler employee, John Barrett, operated this switching engine on the day of Plaintiff's accident. Steve Eovaldi and Clement Onyskow, along with Plaintiff, were responsible for connecting together a series of DODX designated freight cars (DODX is the designation on freight cars owned by the Defendant). Two such cars had been successfully coupled to the switch engine, and the crew was engaged in an attempt to connect a third which was standing on a curved section of the track. Because of the curve, Barrett, in the engine, could not see Plaintiff who was stationed at the point of coupling. Eovaldi and Onyskow were stationed between the engine and Plaintiff to relay signals, by hand, since they had no walkie-talkies.

When the switch engine backed up, the coupler on the third freight car closed without engaging the coupler on the second car. Barrett was signaled to go forward, and the testimony agrees that he moved forward only enough to separate the cars two or three feet. Plaintiff then walked to the third freight car and attempted to open the automatic coupler with a release or "cutting" lever located on the side of the flat car. When this lever failed to function, however, Plaintiff walked between the cars to open the coupler manually (Tr. Dec. 16, 76). The undisputed testimony indicated that when the cutting lever fails, the only way to open the coupler is manually (Tr. Dec. 13, 69; Dec. 21. 99; Dec. 15, 52-54).

The crew used an up-stretched arm to signal the engine driver to stop. Steven Eovaldi, the next man up from Plaintiff saw Plaintiff's difficulty with the coupler and moved towards the coupling to lend assistance. In doing so, he lowered his arm. Onyskow, next up the line, misinterpreted Eovaldi's action as a signal to back the train. He turned and signaled Barrett to back up. Barrett threw the throttle in reverse, the two connected cars quickly lurched back, and Plaintiff, unable to extricate himself from between the moving cars, had his hand and arm mangled and crippled between the couplers.

How was it that a maintenance crew — cement finishers, brick layers, machine cleaners and snow removers — came to be operating railroad switching movements? Plaintiff was the oldest of the crew and had been employed at this facility since 1948. At that time the Defendant United States operated the facility and Plaintiff was an employee of the Defendant (Tr. Dec. 16, 46). In 1952 the government contracted with Chrysler to take over the manufacturing duties, and Plaintiff become a Chrysler employee, still in the Roads and Grounds Department (*Id.* 48). Up until the late 1960's the switching operations had been conducted either by employees for the Defendant or by employees of railroad

companies (*Id.* 49-51). However, at some point in time Chrysler was delegated this function and turned the switching operation over to its Roads & Grounds Department. The crew received no formal training on how to couple cars. The crew had to learn on its own (*Id.* 51). Originally a smaller vehicle called a trackmobile was used for the switching, which operated much like an automobile (Id. 52). Sometime later a switching engine, a full size locomotive, was brought into the facility and persons licensed by Chrysler to operate heavy equipment were trained by government employees how to operate the switching engine (Id. 55). Still, no one instructed the crew regarding the recognized signals used in the railroad industry nor in the safe practices recommended in coupling operations. The crew made up its own hand signals, passing on this information informally to new members of the Roads & Grounds Department (Tr. Dec 13, 58, 59; Dec. 16, 56).

The evidence demonstrated that the immediate causes of this acccident were the failure to separate the cars an adequate distance and the failure of the crew members to use standardized and unambiguous hand signals. Expert witnesses also agreed that it was a minimum safety requirement to separate cars by at least one or two car lengths (50 to 100 feet) before a worker should enter between them to adjust the coupler. The rough hand signals, which the Chrysler Roads and Grounds crew had made up as they went along, were contrased to the sophisticated and precise signals which had evolved for use in the railroad industry over many years (which the trial court, in its memorandum opinion, prosaically compared to the repertoire of a football referee). It was undisputed that had there been proper communication between the "switchmen" and the railroad engineer, or had the cars been separated a safe distance before Plaintiff walked between them, Plaintiff's injury probably would have been avoided.

The evidence was also undisputed that Chrysler had never formulated a safety program for these rail operations before this accident and had never taught the rules of railroad safety to these employees (Tr. Dec. 16, 134, 145). The operation was considered a "low priority" (*Id.* 145). There was not even any formal inspection of this railroad operation before the accident (Id. 138).

All the experts, and knowledgeable lay witnesses, agreed that railroad operations involved highly hazardous activities, especially when performed by a crew not given specialized training.

The Defendant United States maintained at this facility a safety office headed by Robert Shirock, a man who happened to be well versed in railroad safety. Besides himself, the office consisted of four assistants, a clerk and a secretary (Tr. Dec. 21, 53). Under the terms of the contract with Chrysler, Defendant had the responsibility to monitor the safety program of its contractor (*Id.* 58). This was formally done by an annual inspection. If, in the course of this inspection any deficiencies were noted, a report was sent to Chrysler, channeled through the contracting officers, pointing out the deficiencies and recommending changes (*Id.* 59). Chrysler also would submit its safety proposals to Mr. Shirock's department for review (Id. 59). However, although Mr. Shirock asserted that his responsibility to monitor safety concerned the entire facility (*Id.* 102), and was for the benefit of the Chrysler workers as much as for the government employees at the site (*Id.* 110-111), the annual inspections before 1976 did not include a review of the railroad operations (Tr. Dec. 27 27).

Defendant's safety office was maintained on the facilities on a five days a week schedule, from 6:00 a.m. to 6:00 p.m. (Tr. Dec. 21 71). Mr. Shirock testified that if unsafe practices were spotted on the premises, not in the course of the annual inspection, this fact might be brought to the attention

of Chrysler (*Id.* 108-109). Shirock himself worked at the plant since 1967, and acknowledged that in the seven year period before the accident he occasionally watched switching movements along the tracks next to his office (Id. 109). These operations were also visible to his safety department employees (Id. 99). Colonel Nolan also indicated that Shirock's office would be knowledgeable regarding the safety of all aspects of Chrysler's work, including switching operations (Dec 17, 76). But, of course, nothing was comunicated to Chrysler regarding the manner in which these railroad operations were being conducted even though Mr. Shirock and his staff were knowledgeable in railroad safety and must have observed the patent deviations from those standardized practice which were critical to safe switch movements.

Plaintiff filed suit against Defendant on October 28, 1977, alleging several theories of liability, the most crucial, for the purposes of appeal, involving the claim that the United States was liable upon the theory of inherently dangerous activities and on the theory of negligently performing the safety inspections as provided for in the contract. Other theories involved negligent entrustment and products liability. In November, 1979, Defendant was granted a partial summary judgment which dismissed Plaintiff's inherently dangrous activity and negligent entrustment claims. Although Plaintiff attempted to appeal this ruling (and Defendant sought to cross appeal to have the remaining claims dismissed as well), the order of partial summary judgment was deemed to be an interlocutory order and the appeal was dismissed (August 31, 1981). Subsequently, Plaintiff filed a motion for rehearing and the trial court reinstated all of Plaintiff's original claims (September 21, 1982).

After a bench trial, held in December, 1982, the trial court entered its memorandum opinion and order on April 12, 1983 (at 561 F. Supp. 362). The Court agreed with Defendant that the entrustment of the railroad cars to Chrysler involved a discretionary function for which the Defendant

would not be liable under the Federal Tort Claims Act (at 365). The Court also dismissed Plaintiff's products liability claim based upon the total absence of any evidence that the failure of a coupler to couple automatically was evidence of a defect.

The trial court did, however, find Defendant liable based upon a review of Michigan law and the law of other federal court cases. The trial court found that the switching operations constituted an inherently dangerous activity for which the defendant, as principal under Michigan law had a direct duty to see was performed by its contractor in a safe manner. The trial court also found that defendant had been negligent in conducting its safety inspections of Chrysler. The court awarded damages to Plaintiff in a total sum of $479,843.81.

Defendant appealled to the Circuit Court of Appeals for the Sixth Circuit. While this appeal was pending, this Honorable Supreme Court issued its decision in *United States v S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) et al*, 467 US ___, 81 LED 2d.660; 104 S Ct 2755 (1984). (For convenience, hereinafter referred to as *United States v Varig Airlines).*

The Court of Appeals, finding this decision to state legal principles applicable to the present case, held on December 12, 1984, that the defendant's responsibility to monitor the safety practices of its independent contractor involved a discretionary activity excepted from the provisions of the Tort Claims Act. On this basis the decision of the District Court was reversed and a mandate entered on December 12, 1984, vacating the decision of the District Court and remanding with instructions to dismiss petitioner's complaint.

REASONS FOR GRANTING THIS WRIT

Petitioners seek a writ of certiorari from this Honorable Court in order to clarify the scope and extent of the *Varig Airlines* decision. In the present case the Circuit Court of Appeals followed the *Varig Airlines* decision to relieve the defendant from responsibility for its failure to properly monitor the safety practices of a contractor engaged by Defendant to perform services for the Defendant. Petitioners submit that a valid distinction can and should be drawn between the discretionary function of the government engaged in regulatory activities and the non-discretionary duties which arise pursuant to state law whenever the United States itself undertakes, through its contractual powers, to institute some activity for its own benefit.

United States v Varig Airlines concerned the duty of a regulatory agency — the Federal Aviation Administration — to enforce its safety regulations and to conduct inspections to ensure compliance with those regulations. In reviewing the legislative history of the Federal Tort Claims Act, this Court saw that the discretionary function exception was originally designed to except from the tort claims act the activities of such regulatory agencies. Quoting from the transcript of the House Committee on the Judiciary, this Court observed that the discretionary function exception was "designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency." The reason behind this rule was to prevent the Courts, through tort cases, from second-guessing the propriety or enforcement of an administrative regulation. "It is neither desireable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort."

Speaking on its own, this Court has held that the "basic inquiry concerning this discretionary function exception is

whether the challenged acts . . . are of the nature and quality that Congress intended to shield from tort liability":

> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals . . . This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act. Congress wished to prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic and political policy through an action in tort . . .

As the Court in *Varig Airlines* moved from the general exposition of the law to treat with the specific facts of the cases presented, it held that the decision of the FAA to make only "spot checks" of the airline industries subject to its regulations fall within this discretionary function. The Court found that to impose tort liability upon the manner in which regulations were enforced would be to "second-guess" the political, social and economic judgments of the agency:

> . . . When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transporta-

> tion safety and the reality of finite agency resources. Judicial intervention in such decision making through private tort suits would require the courts to "second-guess" the political, social and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

The Court noted, critically, that the duty of the FAA was "to *promote* safety in air transportation, not to insure it.

Petitioners here have absolutely no criticism of the holding of this honorable Court in *Varig Airlines*. We agree with the logic of the Court which leads to the conclusion that regulatory agencies should not be curtailed by tort law principles from making important policy decisions as to how best to expend their resources in carrying out their regulatory functions. Rather, our appeal here focuses upon the misapplication of *Varig Airlines* to an entirely different situation, one in which the government is not simply involved in regulating a private manufacturer, but is itself active in inducing that manufacturer to perform services for the government. Petitioners respectfully assert that the discretionary function exception as examined in *Varig Airlines* does not formulate a proper defense under the Tort Claims Act when, as here, the United States becomes directly involved in initiating those activities which ultimately lead to an injury.

The facts of the present case have been outlined above. Briefly, the United States contracted with Chrysler Corporation for Chrysler Corporation to enter onto premises owned by the United States in order to build tanks for the United States. Plaintiff was an employee of Chrysler injured in the course of moving railroad stock also owned by the United States. He was injured because neither his own employer, Chrysler, nor the United States, took the trouble to promote a proper safety program for the workers selected to perform

this railroad switching operation, which all agree was inherently dangerous.

This is not a case involving some general regulatory authority of an agency of the United States. For example, this is not a case involving a claim by a Chrysler worker, working at a Chrysler plant, building automobiles for Chrysler, asserting that he was injured because government agents negligently failed to discover some safety hazard in the course of an OSHA inspection. Such a case would properly invoke the rule of *Varig Airines*. Rather, this is a case in which the United States itself, having entered in a contract which required Chrysler's workers to be involved in the inherently dangerous work of railroad switching, failed to take steps, as required under state law, to see that such switching operations were done safely. This case does not concern defendant's regulatory powers over Chrysler, but its own duty of due care towards the workers exposed to ultrahazardous dangers as a result of its decision to engage Chrysler to undertake work on its own behalf.

The Circuit Court failed to note or to draw this distinction in deciding this case. Instead the Circuit Court simply concluded that the Defendant's decision to conduct only "spot checks" of Chrysler's safety program and to delegate safety responsibility to Chrysler paralleled to FAA's decision to "spot-check" airline manufacturers and to delegate to such manufacturers the ultimate responsibility for safety. After identifying these parallels, and ignoring the fundamental difference between regulatory and contractual obligations, the Circuit Court merely applied the conclusionary language of *Varig Airlines* to relieve the United States of its tort liability. We respectfully submit that the Circuit Court committed a serious error in ignoring the fundamental differences between the facts of the present case and those of *Varig Airlines*. A more careful analysis of the nature of the discretionary function exception, as examined by this Court in *Varig Airlines*, will show that the discretionary function exception is not applicable to the facts of the present case.

A. NATURE AND QUALITY OF THE ACT

In *Varig Airlines* this Court stated that the first test of the discretionary function exception was whether the act of the government was of a "nature or quality that Congress intended to shield from tort liability". This test clearly applies to the regulatory acts of agencies authorized by Congress to oversee private industry in the private sector, as the history of this exception examined by this Court well demonstrates. But in the present case this test must be balanced against the intent of Congress to impose tort liability upon the government when the government itself undertakes action within the private sector. Recall that the operative language of 28 USC §2674 provides that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private indivudal under like circumstances . . .

Throughout the present case Petitioners premised the liability of the United States upon the principle that one who engages an independent contractor to do work which is inherently dangerous has a non-deligable duty to see that the work is done in a safe manner. This is a common law rule of liability adopted in many jurisdictions, including Michigan, the place where the present suit arose. (28 USC §1346b directs the district court to hold the United States liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). In Michigan, the inherently dangerous activity principle "is applied where a duty is imposed upon the employer in doing work necessarily involving danger to others, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger. It is this duty which cannot be delegated to another so as to avoid liability for its neglect." *Vannoy v City of Warren*, 15 Mich App 158 166 NW 2d 486 (1968). *See also, Inglis v Millersburg Driving Ass'n*, 169 Mich 311, 136 NW 443 (1912).

As a general common law rule, one who engages an independent contractor is not liable for injuries caused by the negligence of that independent contractor. This common law rule has been directly incorporated into the tort claims act which specifically excludes a contractor from being considered an "agent" of the United States. 28 USC §2671 (Under the Tort Claims Act the United States is liable only for the negligence of its "employees" or "agents"). But the entire thrust of Petitioners argument throughout this litigation has been that pursuant to the "inherently dangerous activity" rule, an exception to the general "independent contractor" rule, the United States may be held liable for the negligence of its own employees and agents where, under state law, one who engages an independent contractor retains a legal duty towards those who become exposed to inherently dangerous work by virtue of that engagement. This common law duty, where it is recognized, does not create "discretion" in the principal to oversee the safety practices of its contractor. Unlike a Congressional directive to an administrative agency to regulate a private industry — leaving to that agency the discretion to establish the means and methods of carrying out that directive — the inherently dangerous activity doctrine *mandates* that the principal see to it that the contractor undertake appropriate safety measures to assure that the dangerous job is done safely.

We recognize that state law does not govern the principles of the Tort Claims Act. As this Court noted in *Varig Airlines*, before reaching the issue of whether the United States was liable under California's "good samaritan" doctrine, the question of jurisdiction under the Tort Claims Act has to be confronted. We are not saying here that the inherently dangerous activity doctrine overrides the discretionary function exception. What we do say is that the discretionary function exception simply does not apply once the United States undertakes an activity which is of a non-discretionary nature. The United States may or may not regulate the activities of airline manufacturers, and once it does decide

to regulate such manufacturers, it has broad discretion in determining the manner and extent of such regulation. The United States also may or may not engage independent contractors to perform services for the United States. However, once the United States does engage an independent contractor to perform services, it becomes subject to duties and obligations which are *not* of a discretionary nature. Once it decides to enter the State of Michigan to engage a contractor to build tanks, the United States, now in the role of a principal and subject, under the Tort Claims Act to the same liability as a private person, no longer can claim the benefit of any "discretion" in fulfilling its legal duties and obligations. The question is no longer whether the Congress has authorized the United States to regulate the safety practices of its contractor — leaving it to the discretion of government agents and employees to determine the means and method of carrying out such regulations. The question is simply whether the United States, having set in motion the activity of the contractor, is free to ignore the concomitant duties and obligations arising out of the law of the place where that activity is to be performed.

Petitioners submit that once the United States steps beyond its role as mere regulator of private industry to actively institute activity by a contractor, the shield Congress erected for discretionary functions is abandoned by the government. The United States now becomes an active mover of the activities involved under the contract, itself responsible for the manner in which the contract is fulfilled. True, the negligent acts of the contractor itself do not attach liability to the United States under the Tort Claims Act, but the Act nevertheless renders the United States liable for the negligence of its own employees in this failure to fulfill the non-delegable — and non-discretionary — duties imposed upon the United States by the law of the place where the activity intitiated by the government takes place. These duties are not of the same nature and quality of those of a regulatory agency. They are of the nature and quality of those duties imposed upon any other private person in like circumstances.

Because the activities engaged in by the United States in the present case are not merely of a regulatory nature but place the United States in a posture where it must comply with duties and obligations imposed by law — and arising out of its own initiative — we respectfully submit that its acts are not of the nature or quality which Congress intended to shield from tort liability.

B. "SECOND-GUESS"

The second test considered in *Varig Airlines* concerned whether the imposition of tort liability on the defendant would require the courts to "second-guess" the "political, social and economic judgments" of a governmental agency. In the present case, the imposition of such liability would not have this unwarranted effect.

Liability in this case is not premised upon either the decision of the United States to build tanks, nor upon its decision to engage an independent contractor — or Chrysler specifically — to build tanks. Petitioners recognized from the beginning of this suit that these decisions are of an administrative nature certainly involving the discretionary function of the United States. However, contrary to what the United States contended below, we do not believe it was the intent of Congress, or of the Court's interpreting the Tort Claim Act, to hold the United States immune from tort suit in its execution of a program simply because the United States had discretion to initiate, or not initiate, that program in the first place. Indeed, if such were the law, then it is inconceivable that the United States could ever be held liable for the torts of its employees. Even the negligent operation of a mail truck, were this argument followed, could be deemed cloaked with immunity since the United States has the discretion to decide how the mail is to be transported.

The federal courts have long distinguished administrative decisions, involving issues of policy, from the operative details of carrying out the work of the government. Indeed,

a catalogue of cases may be listed which have specifically held that while the United States exercises its discretion in deciding whether to enter into a contract or not, once it has chosen to do so, the operative means of carrying out that contract become subject to the general liability imposed by the Tort Claims Act.

For example, in *Barron* v *United States*, 644 F 2d 664 (9th Cir, 1981), the United States had engaged an independent contractor to perform excavation work. Plaintiff was injured when improper shoring, observed by a government safety inspector, gave way. Sued on the basis that the excavation was inherently dangerous and that the United States had a non-delegable duty to see that the job was carried out safely, the Court gave short shrift to the governments argument that warning about the safety of the shoring involved an exercise of discretion. "Failure to take action where action was clearly mandated by the interests of safety," the Ninth Circuit said, "was operational" and not discretionary. Likewise, in *Toole* v *United States*, 588 F 2d 403 (3rd Cir, 1978), involving an injury to an employee of an independent contractor producing anti-tank explosives, the government's argument that the discretion to award this contract to plaintiff's employer cloaked with immunity its liability for failing to warn that the equipment being used was unsafe, met the court's response that a decision to warn against a danger "did not require any judgments about policy" as *Dalehite v United States*, 346 US 15 (1953), requires for the discretionary function exception to apply.

In *McGarry* v *United States*, 549 F 2d 587 (9th Cir, 1976), *cert denied*, 434 US 922 (1977), the government argued that it exercised its "discretion" in delegating all responsibility for safety precautions to its independent contractor. However the Court, noting that the contract retained to the government the right to inspect, and that the government had a staff of employees engaged to review the contractor's safety program, stated:

> As a matter of policy, then, the AEC chose to retain some responsibility over matters of employee safety. The meeting of that responsibility was an operational function. The manner in which the responsibility was to be met was subject to decision at the operational rather than the planning level, and accordingly was not an exercise of a discretionary function.

These cases, and others which have held the United States, as a contractor, liable for its own negligence under the inherently dangerous activity doctrine — *See also, Thorn* v *United States*, 479 F 2d 804 (9th Cir, 1973); *Emelwon Inc* v *United States*, 391 F 2d 9 (5th Cir, 1968); *Rooney* v *United States*, 634 F 2d 1238 (9th Cir, 1980); *United States* v *Babbs*, 483 F 2d 308 (9th Cir, 1973) would all falter under the Sixth Circuit's interpretation of *Varig Airlines*. That interpretation suggests that the duty of the United States as principal to inspect the safety practices of its independent contractor involves a discretionary function equivalent to that of a regulatory agencies duty to inspect. What the Sixth Circuit ignores, however, is a fundamental distinction between a general regulatory function — which should be beyond the interference of the Courts in tort cases — and a specific operational duty to inspect imposed by tort law principles.

The inherently dangerous activity rule *does not* say that the principal who engages an independent contractor to do such work may or may not take notice of the contractor's safety practices. Instead this doctrine mandates that the principal *must* oversee the contractors safety practices, that the principal, in fact, has a non-delegable duty to the workers to see that proper safety measures are taken.

Thus we do not deal in such cases with matters of political, social or economic judgment. Once the defendant has decided to engage a contractor to do work which necessarily exposes the workers of the contractor to inherent dangers, the exercise of judgment by the government has

been executed. What the law *requires* as a result of that decision is that the United States take appropriate steps to assure that the contractor does the work in a safe manner. This is an obligation imposed upon the United States, under state law, as a contracting party, and not as a regulatory agency. The mandate arises from the government's active participation in initiating the work, and not from a general regulatory authority entrusted by Congress to the governmental agency.

The distinction is crucial. In *Varig Airlines* this Court said that the FAA had a duty to *promote* safety, not to insure it. That duty, to insure safety, rested with the manufacturer. But such a duty adheres to the manufacturer as a result of its decision to manufacture airplanes, as a result of its own decision to act in a manner which may affect the safety and well being of others. The government does not manufacture commercial airplanes, nor does it require any private manufacturer to do so. The government only elects to oversee the manufacturing process in the hope of promoting safety, and it is within the government's discretion to decide how this policy shall be carried out. Political, social and economic judgments are involved in determining to what extent private manufacturers of airplanes should be regulated by the government.

However, when the government itself undertakes a program, different policies under the Tort Claims Act are brought into play. No longer may it be said that the United States is responsible only to promote safety. In engaging an independent contractor to do inherently dangerous work, the United States itself places in jeopardy the welfare and health of others who may be directly affected by its decision and through the failure to *insure* that proper safety practices are instituted. The United States places itself in a role indistinguishable from that of the airplane manufacturer, for its own actions place in motion the activities which may cause injury to others. The safety of those affected by the govern-

ment's initiation of a manufacturing program no longer falls within the realm of political, social or economic judgment, for the tort claims act specifically imposes upon the United States the liability which would be imposed upon a private person in like circumstances. Consequently, the analogy which the Circuit Court has drawn between regulatory agencies and duties arising from a contractual agreement necessarily fails. The practical situations are entirely different and require the application of distinct rules of law.

The Circuit Court was wrong in asserting, in the present case, that the duty of the United States to inspect and monitor the safety practices of its contractor involved matters of political, social or economic judgment which could not be interfered with in a tort case. Having opted to contract with Chrysler to have work done of an inherently dangerous nature, the means and methods of carrying out that work for the government was no longer a matter for discretion. In imposing a duty upon the government to monitor or inspect the safety program instituted by the contractor to protect workers engaged in such work, the Court is not "second-guessing" any political, social or economic policy of the government. Having initiated such work, it is simply negligent for the government to fail to undertake proper monitoring of the safety programs of the contractor, for this is a responsibility which adheres to the activity itself. This is really no different from holding the government liable for an employee's negligent operation of a mail truck. If the government chooses to have its employees operate a mail truck, then this decision mandates that the task be carried out in a safe fashion. By the same token, if the government decides to have a contractor do inherently dangerous work, this decision mandates that the government see to it that the work is performed safely. If agents or employees of the government are negligent in operating a mail truck, or in overseeing the safety programs of a contractor engaged to do inherently dangerous work, the government properly may be held liable for such neglect.

The Circuit Court below erred in failing to recognize the distinctions which can be legitimately drawn between *Varig Airlines* and the present case. It erred in misapplying the language of *Varig Airlines* to a case which was factually different and which required the application of policy considerations not discussed in *Varig Airlines*.

This is not an isolated case. This case is representative of all cases involving government contracts and the government's responsibilities under such contracts. as indicated, many states hold that a principal who engages an independent contractor to do inherently dangerous work has a nondelegable duty to insure that the dangerous work be done safely. Cited above are several federal court cases which have applied this common law doctrine to the United States when sued under the Tort Claims Act. These cases recognize that the United States, like any other contactor who sets in motion a chain of events leading to the performance of such dangerous work, carries the responsibility to see that the job is safely performed. A breach of that responsiblity is negligence which has been recognized to fall within the general liability provisions of the Tort Claims Act. We here ask this honorable court to endorse the validity of petitioner's tort claim under this act by reversing the erroneous decision of the Circuit Court.

RELIEF REQUESTED

For these reasons, Petitioners ask that a Writ of Certiorari issue to the Circuit Court of Appeals for the Sixth Cirucit.

Respectfully submitted,
SOMMERS, SCHWARTZ, SILVER
& SCHWARTZ, P.C.
BY: Robert G. Portnoy (P19019)
26555 Evergreen, Ste. 1800
Southfield, MI 48076
(313) 355-0300

Dated: February 28, 1985

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

GUSTOF CHARLES FEYERS AND GABRIELLE FEYERS,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

HOWARD SILVER
Counsel of Record
1800 Travelers Tower
26555 Evergreen Road
Southfield, MI 48076

ROBERT S. PORTNOY
Counsel for Petitioners
FOR SOMMERS, SCHWARTZ, SILVER, & SCHWARTZ, P.C.
1800 Travelers Tower
26555 Evergreen Road
Southfield, MI 48076

RICHARD D. TOTH
Of Counsel

THE AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUSTOF CHARLES FEYERS,
and GABRIELLE FEYERS,
Plaintiffs,

-vs- Civil Action No. 77-72591

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This matter having come before the court, and the court having entered its Memorandum Opinion and Order;

IT IS ORDERED AND ADJUDGED that judgment in the amount of $429,843.81 be awarded to Gustof Charles Feyers.

IT IS FURTHER ORDERED AND ADJUDGED that judgment in the amount of $50,000.00 be awarded to Gabrielle Feyers.

/s/ ANNA DIGGS TAYLOR,
U.S. District Judge

Dated: APR 12 1983

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Memorandum Opinion and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUSTOF CHARLES FEYERS,
and GABRIELLE FEYERS,
Plaintiffs,

-vs- Civil Action No. 77-72591

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION AND ORDER

This action is one for negligent personal injury filed pursuant to the Federal Tort Claims Act, which provides that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances" in accordance with the law of the state in which the alleged negligence has occurred. 28 USC §2671 *et seq.*

Plaintiff Gustof Feyers commenced work at the Detroit Tank Arsenal in 1948, as a U.S. government employee. His duties then, in the roads and grounds department, included the mowing of grass, shoveling of snow, and general outside maintenance. Those duties were substantially the same on April 24, 1976, when he sustained the serious injury which precipitated this lawsuit. He was transferred to the payroll of the Chrysler Corporation in 1952, however, as the United States had contracted with that corporation to operate and produce vehicles for the government at the facility, of which the government retained ownership. Feyers had advanced in 1962 to the position of group leader as most senior of the grounds crew and, at some point in the late 1960's, he and his fellow groundsmen were given the added duties of occasional service as railroad switchmen. His classification was

cement finisher. Switching duties were added to those informally expected of the grounds crew when Conrail ceased switching Department of Defense flatcars within the Tank Arsenal's railyard, and Chrysler overtook the operation of loading newly built M-60 tanks onto army flatcars, switching the cars among rail tracks with an army-owned locomotive as necessary, and heading them out to commercial rail lines.

Plaintiff sustained serious and permanent injuries to his right hand and forearm while attempting to couple two army flatcars in the army-owned, Chrysler-operated facility on April 24, 1976. He seeks to recover against the United States on four theories of Michigan law. They are:

> 1. A products liability claim based upon the allegedly defective condition of the flatcars which failed to couple automatically.
>
> 2. Negligent safety inspections by government personnel responsible under Chrysler's operatins and productions contracts for for monitoring safety conditions and practices pursuant to federal reservations of rights.
>
> 3. Negligent entrustment of dangerous instrumentalities (the flatcars and switching engines) to persons of whose incompetence it had notice.
>
> 4. The nondelegable duty of an owner to those who might be injured by the negligence of a contractor hired to perform an inherently dangerous activity.

The Judge to whom this case was first assigned granted the government summary judgment on two of the above theories: those of negligent entrustment and of the owner's liability for a contractor performing inherently dangerous work. The entrustment was found to be a discretionary governmental function, for which the United States cannot be held liable. See *Dalehite* v. *United States*, 346 US 15 (1952). The theory of liability for inherently dangerous work was

held to be closely akin to strict or vicarious liability in Michigan law and therefore similarly barred as a basis of FTCA liablility. See *McDonough* v. *General Motors*, 388 Mich 430 (1970), and *Laird* v. *Nelms*, 406 US 797 (1971). On motion for rehearing, this court reinstated those two bases of plaintiff's claim for trial, which was held to the bench December 14 through 21, 1982 on all four claims.

After full consideration of all of the evidence presented and careful evaluation of the credibility of the witnesses, their demeanor and manner on the stand, and the degree to which their testimony is supported both internally and by other credible evidence; and after review of the briefs of the parties and authorities cited therein, it appears to this court that it must enter judgment for plaintiff on the basis of the findings of fact and conclusions of law discussed below.

First, the court must dismiss plantiff's claim of products liability, based upon one or more allegedly defective flatcars or couplers. The testimony was unanimous that those instrumentalities are not defective merely because the cars to not couple automatically when pushed together by a locomotive. That is a normal occurrance, and appears to be the chief reason for employment of switchmen. The court must also dismiss plaintiff's claim of negligent entrustment. The facts appear to support the government's argument that the decision to entrust the flatcars to Chrysler Corporation was indeed discretionary and therefore exempt, under *Dalehite*, *supra*.

It is clear to the court, however, that plaintiff must prevail on his theories of government negligence in monitoring Chrysler's safety program, and of government liability as owner for knowingly permitting the contractor's negligent performance of inherently dangerous activities *of which the government retained supervisory control* and during which the government maintained a continuing presence and oversight.

FACTS

On the day of the accident, plaintiff and his three fellow grounds crew members were repairing flooring when their supervisor directed them to gather together three army flatcars which had been loaded with newly produced tanks and to align and attach them on a certain track, using the army locomotive, to be shipped away by a commercial railroad. Since Chrysler had taken over all railyard train movements in the 1960's the duties of switchman and engineer were performed by the grounds crew as necessary and as available by assignment on a seniority basis, because a higher rate was paid for the work. Plaintiff testified quite credibly that "we just picked up" a way of performing switchmen's work, and "figured it out." When the government locomotive was brought for them to use, two "government men" taught the entire grounds crew how to operate it, and a Chrysler heavy equipment operator was given a locomotive operator's license. On the day of this accident that operator was away, however, and another heavy equipment operator, Barnett, was enlisted to drive the locomotive. Plaintiff has never heard of any safety rules for switching operations, never seen a manual, and never heard of a uniform set of signals. Neither had any of his fellow crew members, and his supervisor's testimony to the contrary is patently incredible and contradicted by every relevant fact of record.

As the most senior man of this crew, plaintiff was the "end man," or the man farthest from the engine who was directly at the point of each coupling. They assigned themselves their positions alongside the train, putting the newest man closest to the "engineer." The first two cars were coupled to the locomotive automatically, by backing the locomotive into the car, and pushing their couplers together. The third car, however, refused to couple in this manner. It stood on a curve in Track Number Six, which lay immediately adjacent to the building which housed the seven United States contract safety engineers responsible for Chrysler's safe performance of its contract.

Because of the curve in the track, the "engineer" could not see plaintiff, the end man. Plaintiff waved his hand, suggesting that the locomotive should be pulled forward for him to step between the cars and manually correct whatever problem had prevented the couplers from joining. The two other men on the ground passed on his wave to the engineer, who moved the locomotive forward an undisputed distance of three or four feet. Plaintiff stepped between the cars to adjust couplers while the two others alongside kept their hands raised at a "halt" attitude. Then Eovaldi, the man nearest plaintiff, decided to walk back to see what plaintiff was doing, lowered his hand in doing so, led the next man to believe and to signal that it was time to backup the locomotive, which the "engineer" then did, and Eovaldi found plaintiff with his right hand and forarm crushed, pinned between the flatcars.

The witnesses, including government and Chrysler safety engineers and railroading experts as well as plaintiff's, agreed unanimously that the task of a switchman, specifically the coupling and uncoupling of railroad cars, is hazardous work. The defense argument here, however, is that plaintiff or any similarly situated workman should exercise "common sense" and not place himself in jeopardy between railcars or if so doing, should get clear when railcars are closing in on him. Therefore, it is argued, plaintiff himself was the sole cause of his injury. The court cannot accept such an argument.

The defense expert in railroading safety testified, as did plaintiff's experts, to the rigid regulation imposed by the federal government and the railroading industry itself upon the universally recognized extremely hazardous work of railswitching operations. Standard signals and methods are nationally promulgated and published, and required to be taught every operational railroading employee through the rigid and intensive training, examination, and biennial requalification programs undisputedly required to be conducted for the safety of such persons.

All experts also recognized the universal rule that railcars must be at least one car length apart before any switchman enters between, and the requirement that all railroaders be so trained. The government's railroad safety expert even testified, amazingly, that plaintiff was injured because he violated that rule by stepping between flatcars less than four feet apart and had no time to extricate himself. By some quirk of logic, however, that same expert refused to acknowledge that plaintiff and his fellow groundsmen should have been *told* of the rule. It is still the unswerving position of the government and its witnesses that plaintiff's common sense should have led him, by some marvelous coincidence, to all of the procedures and precautions which safety engineers have contributed to American railroading over the past half-century or more. That is a high tribute the plaintiff but a sad commentary on the engineers. It must further be noted that the uniform safety rules and procedures imposed by the federal government and the railroad industry upon commercial railroading are equally recognized and applied to industrial rail operations and to all U.S. Army rail operations.

The handbooks required to be given to every commercial railroad switchman, which are in evidence here, contain the identical handsignal directives which are found in the U.S. Army railroading manual which was available at the Army Safety Engineers' Office at the facility on which plaintiff was injured. Flatcar separation distances are equally enforced in both the public and private sectors, as is the cardinal rule that communications must never be broken between the swtichman between cars and the engineer. Plaintiff's commonsense had indeed led him to request walkie-talkie radios, after he had seen Penn Central switchmen use them and prior to this accident, but his request fell upon deaf ears. No training was ever given to any of the Chrysler grounds crew in safe switching operations. The testimony of plaintiff roads and grounds supervisor, Osborne, to the con-

trary was patently false. If indeed he did teach safety procedures to the crew he could not recall even one at the time of trial and must have concocted them himself, inasmuch as he admittedly had never seen a manual.

The Chrysler Safety Admministrator at the Detroit Arsenal Tank Plant testified that the government tank-building contract did require that he develop safety programs and that he had done so once, "years ago." He developed his safety program on a "priority basis," and he determined priorities on the basis of plant injury experience, not national statistics. Inasmuch as no injury had occurred in the plant switching operation prior to plaintiff's, there was no safety program for the railyard, no safety inspection had ever been conducted therein, and no procedures had ever been reviewed. He was aware that the grounds crew had never been trained to perform the switching operations, and himself had no knowledge of the existence of standard signalling procedures.[1]

Mr. Robert Shirock had been the U.S. Army Safety Director for the Tank Automotive Command since 1962, at the time of plaintiff's accident. He is a highly educated, certified safety engineer who, with a staff of six subordinate safety engineers, maintained permanent offices in an Army building adjacent to the railyard. His offices included a safety library which in turn included Army Technical Manual 55-200, incorporating all national standard railroading procedures. He stated that he was responsible for the safety of all employees at the facility, Chrysler's as well as Army, and that his inspectors inspected for hazards and injurious conditions in Chrysler operations five days weekly, from 6:00 A.M. to 6:00 P.M. His duty was to monitor Chrysler's

[1] The court can only note concerning the standard signals, having seen the experts demonstrate them, that they are at least as complex as the repertoire of a football referee and bear no relation to the casual hand-waving which plaintiff and his fellow groundsmen demonstrated that they had "made up" among themselves.

safety programs (which were required by contract to be developed) and to require corrections and improvements as he deemed necessary, by requests through the channels of the contracting offices of the respective parties. He testified that he knew in 1976 that railroading is harzardous, that training in signalling, distances, and flagman placement, is significant; and he knew of Chrysler's railyard operations. However, he knew nothing of the yardmen's training, had never conducted a safety conference concerning rail operations or had an inspection of the yard done; and he knew that no railroad safety program existed at Chrysler and had required none to be developed, although he acknowledged having authority to do so. It was Mr. Shirock's position that plaintiff's lack of commonsense had caused his accident. There had been no necessity for a railyard safety program prior to plaintiff's accident, in his opinion, because there had never been an injury.

CONCLUSIONS

Although the government correctly argues that its waiver of immunity under the FTCA may not be extended to include claims of vicarious liability, recent cases have held the United States liable for the negligence of its contractors where applicable state law imposed a nondelegable duty upon a principal to assure the non-negligent performance of inherently dangerous work. Where in such states, as here, the government has also reserved rights to inspect and knowingly permitted its contractor to utilize inexperienced or careless workers without requiring adequate safety precautions, the government is liable, not vicariously, but for its active negligence and breach of duty.

In *Rooney* v. *United States*, 634 F2d 1238 (9th Cir. 1980), where California law imposed liability upon a principal for the negligence of a contractor to whom an inherently dan-

gerous activity was delegated, and where in addition the United States reserved inspection rights and knowingly permitted its contractor to operate without adequate safety controls, utilizing inexperienced workers, the United States was held liable for plaintiff's resultant injury.

Again, in *Barron* v. *United States*, 654 F2d 644 (1981), the Ninth Circuit followed Hawaiian law in approving the active liability of a principal, albeit the United States, to the employee of a contractor performing extra-hazardous work. In *Barron*, the court noted the government's failure to take steps to eliminate the contractors' flagrant disregrard of major safety requirements which were applicable to the work the plaintiff employee performed. The government's general retained control of that work, it held, made such failure a substantial breach of the government's duty.

If, then, Michigan law imposes active liability upon an owner or principal under such circumstance, it is appropriate that the government be held liable under FTCA. In *Funk* v. *General Motors*, 392 Mich 92, 28 USC 2674 (1974), Michigan's departure from the rule of *McDonough* v. *General Motors*, 388 Mich 430 (1972), commenced, and its movement toward the California rule became apparent.

In *Funk, supra*, our Supreme Court recognized that ordinarily, an owner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated an operation. That rule, however, is held to be "distinguished by the variety of its exceptions," which include circumstances in which the owner retains control of the work or in which by rule of law the duty to guard against the risk is made nondelegable. The court noted that General Motors, in that case, had exercised a high degree of control over the contractor's work, including provision of plans, specifications, and of an architectural-engineering superintendent who was "constantly on the premises and observed numer-

ous tradesmen working on the beams with no nets or safety lines." (393 Mich at 103). The court's holding was that:

> The law does not . . . absolve an owner who acts in a superintending capacity and has knowledge of high degrees of risk faced by construction workers from responsibility for failure to require observance of reasonable safety precautions. 393 Mich at 105.
>
> * * *
>
> *In the area of job safety their knowing acquiescence in nonperformance encouraged, if not legitimized, the derelictions of the sub and general contractors.*
>
> GM is subject to liability because a jury could properly conclude that GM, despite its designation as owner, retained and exercised sufficient control so that it ought to be held responsible for its own negligence in failing to implement reasonable safety precautions by the general contractor and subcontractor. (393 Mich at 108, emphasis added.)

Then in *Dowell* v. *General Telephone Co.*, 85 Mich App 84 (1978), our Court of Appeals applied the *Funk* rule, defining the term "inherently dangerous" as:

> . . . [t]hat type of danger which adheres in the instrumentality or condition at all times, thereby requiring special precautions to be taken with respect to it to prevent injury.
>
> Whether the activity being analyzed is "inherently dangerous" is thus a question of fact for the jury. 85 Mich App at 91.

The *Dowell* court wrote, further:

> As Mr. Justice Levin suggested in *Funk*, *supra*, at 104: "The policy behind the law of torts is more than com-

> pensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury." therefore, economic realities and public policy require that in some cases *de facto* control by the owner be recognized. 85 Mich App at 94.

The court then found that, inasmuch as the contract in question had reserved significant control to that defendant jury could have properly rested liability of the defendant on a finding of its retained control.

Again in *Signs v. Detroit Edison*, 93 Mich App 626 (1979), a principal which had placed an inspector at its contractor's jobsite whose function was to protect the safety and integrity of electric and gas installations was held to have exercised a sufficient degree of control to give rise to a duty to exercise reasonable care for the safety of the contractor's employees.

In *Duhame v. Kaiser Engineering, Inc.*, 102 Mich App 68 (1980), *leave denied* 411 Mich 955, our Michigan Court of Appeals held:

> There is a split of authority in this court on the issue of whether invocation of the "inherently dangerous activity doctrine" can be construed as constituting a vicarious liability claim.
>
> . . . (W)e believe that the better view is found in *Witucke v. Presque Isle Bank* 68 Mich App 559, 610; 243 NW2d 907 (1976), where this court held that the inherently dangerous activity doctrine presents a claim of active rather than passive negligence. 102 Mich App at 73.

Finally, in *Brown v. Unit Products, Inc.*, 105 Mich App 141 (1981), our Court of Appeals again noted that the trier of

fact must determine whether an activity is inherently dangerous and further:

> We find that the allegation that defendant Unit Products engaged in an inherently dangerous activity is not an allegation of passive negligence or vicarious liability and so defendant Unit Products is precluded from receiving commonlaw indemnification. (105 Mich App at 141.)

So the law of Michigan places a nondelegable duty upon a principal to see that inherently dangerous activities conducted by his contractor are performed with the requisite degree of care, and where he permits the contractor to perform such work in a negligent manner the principal is actively negligent. Moreover, the law of Michigan also places liability upon the shoulders of a principal who retains control of contracted work for his failure to require necessary safety precautions.

In this case the inherently dangerous character of railroad switching work is virtually undisputed. Evidence of that fact is overwhelming and this court so finds. The degree of control which the United States exercised over Chrysler's performance of the tank production and facilities operation contracts is also exceptional. The entire facility, including buildings, railyard, locomotive and flatcars, were government-owned. The government maintains a large and permanent presence at the facility, including not only a large quality control and production oversight group, but a staff of seven safety engineers responsible for enforcement of the contract's requirements that all applicable safety laws, regulations and appropriate precautions be implemented. Those engineers maintained a perpetual, daily surveillance of the contractor's safety practices; but they never once concerned themselves with the railyard activities despite the Army Manual which rested on the shelves of their safety library. The Army's Chief Safety Engineer testified that it was within his authority to require, through channels, that a safety pro-

gram be implemented in the railyard if he had deemed one necessary. The combination of factors here present clearly renders the United States liable for the negligence of its safety engineering staff in the making of inspections as well as for knowingly permitting a contractor to proceed in negligent disregard of the safety of the plaintiff.

We turn now to the question of damages. It is undisputed that the plaintiff sustained serious and permanent injuries which reduced his right hand and forearm to an essentially useless appendage. The court finds that plaintiff suffered extreme pain and suffering as a result of defendant's breach of its duty to him. As a result of the accident plaintiff suffered multiple lacerations of muscles and tendons and resultant dysfunction of all the nerves in this right forearm as well as multiple fractures which also impaired the arterial supply of blood to the hand. Several amputations were required to be performed on the digits of plaintiff's right hand.

Plaintiff has moreover required extensive surgery and psychological counseling as a result of his injuries. The quality of his life has been substantially diminished by his injuries. A man who has always worked with his hands, he is very conscious of the appearance of his right hand and ashamed of it. It was only at the insistence of counsel that the plaintiff showed his hand to the court.

The evidence indicates that plaintiff's medical expenses totalled $18,319.21. He also sustained an earnings loss of $135,756.60. Based upon his life expectancy per MCLA 500.834, plaintiff will have lost additional future wages totalling $75,768.00 by the time of his scheduled retirement age of 65 on January 13, 1986. His total economic loss, for which the government is responsible, is $229,843.81.

Based on the pain and suffering that plaintiff endured immediately following the accident, and the pain, suffering,

and humiliation which will continue for him, the court finds it appropriate to award $200,000.00 in compensatory damages to plaintiff.

A separate award of damages is also recoverable for plaintiff's spouse, Gabrielle Feyers. As a consequence of her husband's injuries Mrs. Feyers has had to perform, and will continue to perform, the most basic tasks for plaintiff. Their married life, which was a happy, close, and highly traditional one, is sharply altered for the worse. The nature of the injuries suffered by plaintiff, and its impact upon Mrs. Feyers, requires this court to award her compensatory damages of $50,000.00.

On the basis of the findings of fact and conclusions of law outlined above, it is therefore ordered that judgment enter for plaintiff and against the United States in the amounts set forth above.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR.,
U.S. District Judge

Dated: Apr 12 1968

No. 83-1402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GUSTOF CHARLES FEYERS and GABRIELLE FEYERS,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed December 12, 1984

Before: KEITH and CONTIE, Circuit Judges; and BROWN, Senior Circuit Judge.

CONTIE, Circuit Judge. The United States appeals from a judgment rendered by the district court in favor of appellees Gustof and Gabrielle Feyers pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, on appellees' claims alleging negligent inspection of, and failure to provide safety training in, the railyard where Gustof Feyers was injured. Since we conclude that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions to dismiss.

I.

Feyers was injured on April 24, 1976 while attempting to couple two United States Army flatcars at the Detroit Arsenal Tank Plant, part of the Detroit Tank Automotive Command in Warren, Michigan. Feyers was employed by Chrysler Corporation which operated the facility owned by the United States. One of Feyers' duties was that of railroad switchman. On the day of the accident, the flatcars would not couple automatically when pushed together. Therefore, Feyers signaled for the engineer to pull the engine forward so that Feyers could step in and correct the problem manually. While Feyers attempted to correct the problem, the other workmen between Feyers and the engine kept their hands raised to signal the engineer not to back up. However, the workman nearest Feyers lowered his hand as he went to help Feyers. Thereafter, each workman down the line lowered his hand, and the engine backed up crushing Feyers' right hand and forearm between the cars.

On October 28, 1977, the Feyers filed a complaint against the United States alleging that the flatcars were defective for failing to automatically couple; that the United States had negligently inspected Chrysler's operation of the facility; that the United States had negligently entrusted the flatcars to Chrysler; and that the United States breached its nondelegable duty to provide a safe work area. Trial was held to the court from December 14 to 21, 1982. On April 12, 1983, the district court rendered judgment in favor of the Feyers.[1] The court dismissed the product liability claim due to the lack of proof of defect, and the negligent entrustment claim on the ground that appellant's decision to entrust the cars to Chrysler was discretionary, and, therefore, the court had no jurisdiction over the claim. The court found that the

[1] *Feers* v. *United States*, 561 F. Supp. 362 (E.D. Mich. 1983).

inspection of the railyard by the government's safety officers was negligent and that the United States was liable for failing to provide safety training pursuant to the Michigan doctrines of nondelegable duty and retained control. The United States appeals.

II.

We review below the facts pertinent to the government's challenge to the district court's jurisdiction over the Feyers' claims. The contract between the United States and Chrysler provided:

> The Government and the Contractor shall each be responsible for maintaining a safety program in their areas of responsibility. The Government shall also make periodic spot reviews of the Contractor safety coverage in conjunction with the Government, with particular attention being directed to Government-owned buildings and/or equipment under the accountability and responsibility of the Contractor.[2]

---

[2] Section J-5 of the contract provided in pertinent part:

> It is the understanding and intent of the contracting parties that the Contractor shall endeavor to maintain the maximum degree of safety at all times in the operation of this plant. The Contractor shall comply with all applicable provisions of Local, State, and Federal ordinances (including OSHA), laws and building and construction codes, for that part of the work with the applicable provisions of the handbook, Safety, General Safety Requirements, 1 March 1967, approved by the Chief of Engineers, a copy of which has been furnished to the Contractor. . . . It is further recognized and agreed that the Contractor shall use said AMC Safety Manual AMC 385-100 as changed or amended as a guide in the operation of the plant. The parties in their endeavor to maintain the maximum degree of safety shall cooperate in all regards in the administration of the safety program and in developing and applying as mandatory those provisions of said Manual which are consistent with the existing plant structure, facilities, and personnel resources when mutually agreed upon by the parties hereto. In any modification or alteration of the existing plant layout, structures, or equipment to meet requirements for additional production or

Since 1967, the United States has maintained a Tank Automotive Command Safety Office of four to five persons in a building adjacent to the railroad. The office was responsible for the safety of Defense Department employees in neighboring states as well. At the time of the incident, this staff was headed by United States Army Safety Director Robert Shirock, a certified safety engineer. Shirock testified that the office initiated safety programs only for the Army employees at the Tank Command. The office monitored Chrysler safety procedure through an annual inspection. Shirock testified that safety priorities were based on accident experience, statistics and inspection deficiencies, and that there had been no personal injuries in the Chrysler railroad operation prior to Feyers' injury. Shirock emphasized that the United States had no input into hiring by Chrysler, no authority to designate which employees worked in the railroad operation, and the government did not know which employees were so assigned or their experience or training. Chrysler was required by the contract to comply with the provisions of AMC Safety Manual AMC 385-100, but Shirock testified that he had no authority to order Chrysler to modify its practices to comply with the terms of the Manual. The Manual did not include specific procedures to be used in railroad operations.

George E. Nolan, Jr., the procurement and administration officer for the United States who negotiated the contract, testified that the government had no responsibility to question Chrysler regarding the training of its employees. Nolan testified that the reference in the contract to "spot reviews" re-

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changes in processing techniques for new items of production at the plant, the Contractor shall, incorporate in said plant modifications and alterations any safeguard prescribed by said Manual as changed or amended. The Contractor will maintain an accurate record of, and will report to the Contracting Officer, in the manner and on the forms prescribed by the Contracting Officer, exposure data and all accidents resulting in death, traumatic injury, occupational disease, and/or damage to property, materials, supplies, and equipment incident to work performed under this contract.

ferred to the annual audit or inspection.[3] This limited review mechanism was included in the contract, according to Nolan, because Chrysler was perceived as a prudent contractor with a complex organization capable of managing its safety programs. The Chrysler safety programs were monitored on an "as required" or "exception" basis, so that areas in which there were accidents were monitored first.

Edmond Mathews, Chrysler safety specialist, testified that resources were invested in traning programs in areas with the highest accident rates, such as the tank driving program. Mathews testified that the interaction between the Chrysler Safety Office and United States' safety office was limited to Chrysler providing personnel to escort government inspectors through the plant during the annual inspection. Mathews confirmed that the government safety office could not order Chrysler employees to initiate safety measures, nor did government inspectors have access to the plant to monitor safety without an escort. Mathews testified that the United States had no role in hiring or determining the qualifications of Chrysler's safety specialists.

III.

The United States contends that the district court lacked subject matter jurisdiction to consider the case since the Federal Tort Claims Act's waiver of sovereign immunity does not apply to discretionary acts by government employees. 28 U.S.C. § 2680(a).[4] The district court opinion indicates no

[3] U.S. Safety Officer James Mayr, a member of Shirock's staff, testified in his deposition that "spot checks" could not be made in the plant since Chrysler security clearance was required.

[4] The United States also asserts that the district court erroneously held appellant vicariously liable for the negligent acts of its contractor; that the district court improperly applied the Michigan doctrines of nondelegable duty, retained control and comparative negligence; and that the district court erred in failing to reduce the award of future damages to present value. Because we conclude that the district court lacked jurisdiction, we do not consider these assignments of error.

ruling on whether the inspection by the government's employees or the failure to require safety training for railyard workers was a discretionary act depriving the district court of jurisdiction.

The United States can be sued only to the extent to which it has waived its sovereign immunity. *United States* v. *Orleans*, 425 U.S. 807, 814 (1976). While the Federal Tort Claims Act, specifically 28 U.S.C. § 1346(b),[5] generally waives that immunity, 28 U.S.C. § 2680 reserves immunity in specific instances. 28 U.S.C. § 2680(a) provides:

> The provision of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

If a case falls within the statutory exceptions of 28 U.S.C. § 2680, the court lacks subject matter jurisdiction. *Colorado Flying Academy, Inc.* v. *United States*, 724 F.2d 871, 875 (10th Cir. 1984); *Miller* v. *United States*, 710 F.2d 656, 662 (10th Cir.), *cert. denied*, — U.S. —, 104 S. Ct. 352 (1983);

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[5] 28 U.S.C. § 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Carlyle v. *U.S. Department of Army*, 674 F.2d 554, 556 (6th Cir. 1982). The Feyers' claim that the United States was negligent in failing to provide safety training to the Chrysler workers essentially challenges the United States' delegation of safety responsibility to Chrysler. Therefore, the Feyers contend that the United States' decision to contract for Chrysler to provide safety programs for Chrysler employees did not constitute a discretionary function and that the United States, once having agreed to make inspections, was required to do so non-negligently.

Our resolution of this case follows the analysis of *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, — U.S. —, 104 S. Ct. 2755 (1984), in which an airline and the owner of an aircraft brought an action challenging the Federal Aviation Administration's "spot check" system of compliance review, similar to the "spot review" included in the contract between the United States and Chrysler. The plaintiffs alleged, pursuant to the Federal Tort Claims Act, that the government was negligent in issuing certificates for aircraft that did not comply with applicable safety regulations. The plaintiffs alleged, as do the Feyers regarding Chrysler's safety practices, that the government's inspection process was negligent in failing to inspect certain aspects of the aircraft design. The United States in both cases contends that the basic responsibility for complying with safety standards had been delegated to a private party, the aircraft manufacturers and Chrysler, and that the government, through "spot checks," simply monitored compliance. *Id.* at 2766-67.

Whether the discretionary function exception applies in a case is governed by "the nature of the conduct, rather than the status of the actor." *Id.* at 2765.[6] "Thus, the basic inquiry

[6] The Court in *Varig Airlines* reaffirmed its earlier interpretation of 28 U.S.C. § 2680(a) in *Dalehite* v. *United States*, 346 U.S. 15 (1953).

> . . . [T]he "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the

concerning the application of the discretionary function exception is whether the challenged acts of a Government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability." *Id.* The congressional intent in enacting the exception was "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.*

The Court held that the decisions to delegate inspection responsibility to the manufacturer and to conduct "spot check" monitoring were discretionary decisions.

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accomodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial

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initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36 (footnotes omitted). *Varig Airlines*, 104 S. Ct. at 2764.

> intervention in policymaking that the discretionary function exception was designed to prevent.

Id. at 2768. *Garbarino* v. *United States*, 666 F.2d 1061, 1065 (6th Cir. 1981) (". . . [T]he discretionary function exception also bars that portion of the claim based on the decision of the FAA to delegate inspection duties to an inspection department of the manufacturer"). *See Natural Gas Pipeline Co.* v. *United States*, 742 F.2d 502 (9th Cir. 1984); *Madison* v. *United States*, 679 F.2d 736, 738-39 (8th Cir. 1982) (awarding of government contract to contractor and promulgation of safety manual are discretionary functions); *Blaber* v. *United States*, 332 F.2d 629, 631 (2d Cir. 1964) (delegation of safety responsibility to independent contractor is discretionary function); *Maltais* v. *United States*, 546 F. Supp. 98, 101 (N.D.N.Y. 1982), *aff'd*, 729 F.2d 1442 (2d Cir. 1983) (government decision to delegate safety responsibility to contractor is a discretionary function despite government's retention of the right to inspect and stop work).

The United States' decisions to delegate safety responsibility to Chrysler, to conduct only "spot checks" of Chrysler's safety programs, and to not institute a safety training program for railyard workers are clearly the type of discretionary functions protected by 28 U.S.C. § 2680(a). The evidence established that the United States' safety office was primarily responsible for the safety of government employees, that access to the plant by government inspectors to make "spot checks" was limited by the need for Chrysler security clearance, and that the United States' safety staff could not order Chrysler to change its safety practices. The government's safety director testified that safety decisions regarding specific areas of the plant were based on accident rates in those areas. The decision to rely on the "spot checks" or annual review along with accident rates to establish safety priorities is, in essence, a policy decision, involving the exercise of discretion. Although Chrysler was requred to comply with the AMC Safety

Manual AMC 385-100, that manual did not describe railroad safety procedures.[7] Further, the decision to delegate responsibility for safety to Chrysler was based on a perception by government negotiators that Chrysler was a prudent contractor capable of implementing its own safety program.[8] These facts establish that the acts cited in appellees' complaint constitute discretionary functions over which the district court lacked jurisdiction.

For the reasons expressed above, the judgment of the district court is VACATED and the case is REMANDED with instructions to dismiss appellees' complaint.

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[7] While the discretionary function exception does not apply where mandatory guidelines or regulations are violated, *Colorado Flying Academy, Inc.*, 724 F.2d at 875; *Jaycee Brand, Inc.* v. *United States*, 721 F.2d 385, 389 (D.C. Cir. 1983); *Hylin* v. *United States*, 715 F.2d 1206, 1213 (7th Cir. 1983); *Bergmann* v. *United States*, 689 F.2d 789, 792 (8th Cir. 1982); *Reminga* v. *United States*, 631 F.2d 449, 456 (6th Cir. 1980), this rule is inapplicable in this case since neither the AMC Safety Manual AMC 385-100 nor any other provision of the contract required specific safety measures in the railyard. *See Madison*, 679 F.2d at 739-40 (failure by United States to require compliance with safety manual was not a discretionary act where the government knew of the safety violations and specific safety precautions were required by the safety manual incorporated by reference into the contract); *Barron* v. *United States*, 473 F. Supp. 1077, 1084 (D. Hawaii 1979), *modified*, 654 F.2d 644 (9th Cir. 1981) (failure to correct safety problems not discretionary where contractor disregarded significant safety requirements of the contract). Further, the contract provided that the provisions of the Manual would be applied as mandatory only "when mutually agreed upon by the parties." *See supra*, note 3.

[8] Similarly, in *Varig Airlines*, the Court noted that "[t]he FAA employees . . . were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer." *Id.* at 2768.

**UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 83-1402

GUSTOF CHARLES FEYERS
and GABRIELLE FEYERS,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Before: KEITH and CONTIE, Circuit Judges; and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated and the case is remanded with instructions to dismiss appelees' complaint.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN,
Clerk

Judgment

Issued as Mandate: January 3, 1985

COSTS: NONE

Filing fee ..... $
Printing ..... $
Total ..... $

A True Copy.

Attest:
/s/ Tom Beuaijous
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUSTOF CHARLES FEYERS
and GABRIELLE FEYERS,
Plaintiff,

v.

CIVIL ACTION NO. 77-72591

UNITED STATES OF AMERICA,
Defendant.

ORDER DISMISSING PLAINTIFFS' COMPLAINT

The Sixth Circuit Court of Appeals having concluded that this court lacked subject matter jurisdiction over the aforecaptioned cause,

IT IS HEREBY ORDERED that the plaintiffs' complaint be and hereby is dismissed.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR,
U.S. District Judge

Dated: JAN 17 1985

Office-Supreme Court, U.S.
FILED
MAY 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1423

In the Supreme Court of the United States

OCTOBER TERM, 1984

GUSTOF CHARLES FEYERS AND
GABRIELLE FEYERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT B. NICHOLSON
MARION L. JETTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

11 pp

QUESTION PRESENTED

Whether, under the circumstances of this case, a suit against the United States by an employee of an independent contractor challenging the reasonableness of the government's supervision of his employer's operations is barred by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-25a) is reported at 749 F.2d 1222. The opinion of the district court (Pet. App. 2a-15a) is reported at 561 F. Supp. 362.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on December 12, 1984. The petition for a writ of certiorari was filed on March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Gustof Feyers and his wife brought this action against the United States under the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*), seeking damages resulting from a workplace accident.[1] Following a bench trial, the

[1]For simplicity, "petitioner" will be used to refer to Mr. Feyers.

United States District Court for the Eastern District of Michigan granted judgment in favor of petitioners for $480,000 (Pet. App. 1a, 2a-15a). The court of appeals reversed on the ground that the suit was barred by 28 U.S.C. 2680(a), the discretionary function exception to the Act's waiver of sovereign immunity (Pet. App. 16a-25a).

1. At the time of the accident, petitioner was employed as a maintenance worker by Chrysler Corporation at the Detroit Arsenal Tank Plant. One of his duties was to switch railroad flatcars. Petitioner was injured when a fellow employee mistook another crew member's hand signals and prematurely backed two cars together while petitioner was between them adjusting their coupling mechanism. Pet. App. 17a.

Chrysler operated the plant as an independent contractor pursuant to an agreement with the United States. The contract imposed on Chrysler the duty to " 'maintain[] a safety program in [its] areas of responsibility' " (Pet. App. 18a). The government took responsibility for areas of the Army's Detroit Tank Automotive Command (of which the plant was a part) that remained under its control (*ibid.*). Because government negotiators determined that "Chrysler was a prudent contractor capable of implementing its own safety program" (Pet. App. 25a; footnote omitted), they required Chrysler to " 'endeavor to maintain the maximum degree of safety at all times in the operation of [the] plant' " (*id.* at 18a n.2), reserving to the government only the right to " 'make periodic spot reviews of [Chrysler's] safety coverage' " (*id.* at 18a).

In accordance with these provisions, government safety officers monitored Chrysler's operations on an extremely limited basis; their primary responsibility was for the safety of the Army's 5,500 own employees at the Tank Command and of federal employees at installations in neighboring

states (Pet. App. 19a; C.A. App. 153). The government did not supervise Chrysler's training program or provide safety training to Chrysler's employees (Pet. App. 19a). Rather, government officials toured the plant once each year in the company of Chrysler employees, observing whatever work was then in progress (*id.* at 19a-20a). Government safety officers also investigated accidents that came to their attention, but even these investigations could only be performed with a Chrysler escort (*id.* at 20a & n.3). Although they could report safety problems to Chrysler, government safety officers had no authority to require the firm to make any changes in its operations (*id.* at 19a). Procedures in the railyard had not been reviewed prior to petitioner's accident, which was the first that occurred there, and government officials were unaware of any unsafe practices in that area (*ibid.*; C.A. App. 196, 224-225).

2. The district court concluded that the United States was liable under a Michigan doctrine that "places a nondelegable duty upon a principal to see that inherently dangerous activities [such as railcar switching] conducted by his contractor are performed with the requisite degree of care" (Pet. App. 13a). The district court also reasoned that the government was liable because it had failed to exercise its control over the independent contractor "to require necessary safety precautions" (*ibid.*). The district court did not discuss the discretionary function exception (see *id.* at 20a-21a).

3. While the appeal was pending, this Court decided *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* No. 82-1349 (June 19, 1984). In *Varig Airlines,* the Court held that claims alleging that plane crashes were caused by the Federal Aviation Administration's negligent performance of its aircraft inspection and certification functions were barred by the discretionary function exception. Relying on *Varig Airlines,* the court of

appeals rejected petitioners' contention that their claim was not within the discretionary function exception (Pet. App. 20a-25a). The court of appeals concluded (*id.* at 24a) that the government's "decisions to delegate safety responsibility to Chrysler, to conduct only 'spot checks' of Chrysler's safety programs, and to not institute a safety training program for railyard workers are clearly the type of discretionary functions protected by 28 U.S.C. § 2680(a)." In particular, the design and extent of the government's supervision program represented, "in essence, a policy decision, involving the exercise of discretion" (Pet. App. 24a), as did the decision to delegate responsibilities to Chrysler based on the government's perception of the firm's capabilities and its regard for safety considerations (*id.* at 25a). The court also noted (*id.* at 25a & n.7) that the relevant safety manual did not prescribe mandatory procedures for the railyard.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

The acts complained of by petitioners plainly "are of the nature and quality that Congress intended to shield from tort liability" through the discretionary function exception (*Varig Airlines,* slip op. 15). Contrary to petitioners' contention (Pet. 19), the decisions of the safety officers in this case were hardly analogous to those made in the course of "operating a mail truck." Government officials were charged here not with the execution of a simple, mandatory procedure, but with the exercise of judgment concerning how closely and in what manner to oversee an independent contractor's safety operations at a large and complex plant.[2] As the Court stated in *Varig Airlines* (slip op. 21),

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[2]Petitioners assert repeatedly (*e.g.*, Pet. 10, 11, 12, 13, 14, 17) that the government was negligent and violated a duty owed to Chrysler's employees. This is of course irrelevant — the discretionary function

decisions regarding "the extent to which [the government] will supervise the safety procedures of private individuals" are clearly within the discretionary function exception.

Petitioners seek to avoid this result by urging that *Varig Airlines* is limited to those situations where an agency is regulating private conduct. This distinction fails for several reasons. First, although *Varig Airlines* arose in a regulatory context, the Court's decision is not limited to such circumstances. The Court made it clear (slip op. 15) that governmental regulation was a sufficient, but not a necessary, condition for application of the discretionary function exception.

Second, nothing in the discretionary function exception itself suggests, as petitioners claim (Pet. 14), that "the shield Congress erected * * * is abandoned" when the government undertakes proprietary activity for its own benefit. The language of 28 U.S.C. 2680(a) does not make such a distinction, and it has no necessary relevance to the discretionary quality of a government employee's acts. Indeed, the Court in *Varig Airlines* (slip op. 11) quoted legislative history specifying that " 'administrative action not of a regulatory nature, such as the expenditure of Federal funds [or] the execution of a Federal project,' " is within the exception. As the Court stated in *Dalehite* v. *United States,* 346 U.S. 15, 35-36 (1953) (footnote omitted), the discretionary function exception "includes determinations made by executives or administrators in establishing plans, specifications or

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exception applies "whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). See *Dalehite* v. *United States,* 346 U.S. 15, 33 (1953). Thus, in *Varig Airlines* (slip op. 17 n.12), the Court was willing to assume that the government had violated the "Good Samaritan" doctrine recognized in California tort law.

schedules of operations. Where there is room for policy judgment and decision there is discretion." [3]

Finally, even if there were some merit to the regulatory-proprietary dichotomy, this case fits better in the former category. The government had not assumed direct operational responsibility for the conduct that caused petitioner's injury, but rather was charged only with failing properly to supervise a private person's conduct. This is precisely analogous to the failure to supervise alleged in *Varig Airlines* (see slip op. 16-22). Compare *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) (government's negligent operation of lighthouse); *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1147-1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978) (government's negligent provision of erroneous air-traffic information). Indeed, because the government did not have authority to order changes in Chrysler's safety procedures (see page 3, *supra*), petitioners' claim that the government should have done more than it did may implicate an even greater quantum of discretion than that involved in *Varig Airlines*.

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[3] In *Dalehite*, the Court applied the discretionary function exception to a fertilizer procurement and shipping program undertaken by the government (346 U.S. at 19). The exception applied not only to the decision to institute the program but also to the government's alleged failure, as here, properly to supervise the operational details of the program (*id.* at 38-44).

Had Congress wished to limit the discretionary function exception to regulatory activities, it need not have enacted 28 U.S.C. 2680(a), for 28 U.S.C. 2674 already limits the government's liability to that of "a private individual under like circumstances." See also 28 U.S.C. 1346(b) (government liable only to the extent that "a private person[] would be liable * * * in accordance with the law of the place where the act or omission occurred"). The United States therefore may not be liable under the Federal Tort Claims Act for negligent performance of its regulatory functions, which have no counterpart in the private sector. Cf. *Art Metal-U.S.A., Inc.* v. *United States*, No. 83-2243 (D.C. Cir. Feb. 12, 1985), slip op. 11-13 (government may not be liable for violating its own regulations).

In short, Congress retained the government's immunity with respect to "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer * * * and the efficient allocation of agency resources" (*Varig Airlines*, slip op. 22). Petitioner cites no post-*Varig* case to the contrary.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT B. NICHOLSON
MARION L. JETTON
Attorneys

MAY 1985

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[4]"[P]re-*Varig* cases on the discretionary function must be re-evaluated." *General Public Utilities Corp.* v. *United States*, 745 F.2d 239, 246 n.8 (3d Cir. 1984), cert. denied, No. 84-790 (Feb. 19, 1985); see also *Hylin* v. *United States*, 755 F.2d 551 (7th Cir. 1985) (applying discretionary function exception on remand following *Varig Airlines*). In *McMichael* v. *United States*, 751 F.2d 303 (8th Cir. 1985), the court of appeals held that the discretionary function exception did not apply to a claim that the government had failed properly to supervise its independent contractor's activities. Although we believe that *McMichael* was wrongly decided, that case does not conflict with the court of appeals' decision here because of the significantly greater degree of discretion afforded the safety officers in this case. In *McMichael*, unlike in this case, the inspectors merely "review[ed] [a] checklist for safety compliance" and therefore did not make discretionary judgments (*id.* at 307). The court of appeals in this case distinguished an earlier opinion in the *McMichael* litigation, *Madison* v. *United States*, 679 F.2d 736 (8th Cir. 1982), on the ground that no "mandatory guidelines or regulations [were] violated" here (Pet. App. 25a n.7).